UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 4

CPL (LINWOOD) LLC D/B/A
LINWOOD CARE CENTER AND
ITS SUCCESSOR
201 NEW ROAD OPERATIONS, LLC
D/B/A LINWOOD CARE CENTER

and

Cases 04-CA-146362
04-CA-146670
04-CA-148705 and
04-CA-165109

1199 SEIU UNITED HEALTHCARE WORKERS EAST

RESPONDENT'S SECOND MOTION TO DISMISS IN PART

Respondent, CPL (Linwood) LLCd/b/a Linwood Care Center, pursuant to Board Regulation, 29 CFR 102.24, hereby moves to dismiss Case 04-CA-165109 and the related portion of Case 04-CA-148705, alleging violations due to Respondent's imposition of discipline as to employees identified in ¶11 of the Amended Consolidated Complaint in this matter without notifying the Union prior to imposing such discipline and/or giving the Union the opportunity to bargain; and, in support of dismissal of those related charges, hereby states:

1. The Hearing in this consolidated matter is scheduled to begin on Monday, February 8, 2016.
2. The nursing home employer involved in this matter was sold in an asset purchase on December 1, 2015.
3. Counsel for the NLRB in this matter was advised on January 11, 2015 that the nursing home employer involved in this matter was sold in such an asset purchase.
4. The present owner/operator of the nursing home involved in this matter is 201 New Road Operations, LLC d/b/a Linwood Care Center.
5. All of the acts complained of in ¶11 of the Amended Consolidated Complaint occurred prior to December 1, 2015.
6. The premise for the charge allegations in ¶11 of the Amended Consolidated Complaint is the reasoning articulated in the published decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012).
7. The General Counsel for the Board has conceded that, in light of the decision of the Supreme Court of the United States in *NLRB v. Noel Canning,*__ U.S. __, 134 S.Ct. 2550 (2014)*, Alan Ritchey* is no longer considered binding precedent. *See: Ready Mix USA, LLC,* Case 10-CA-140059, JD-52-15 (NLRB Div. of Judges, September 15, 2015), 2015 WL 5440337 at page 24 (hereinafter, "*Ready Mix"*).

8. In *Ready Mix*, the ALJ dismissed allegations premised on *Alan Ritchey*, *Id.* at page 24-25, based on the following reasoning:

> The General Counsel concedes (GC Br. at 40) that in light of *Noel Canning*, supra, *Alan Ritchey* "is no longer considered binding precedent." He contends, nonetheless, that its rationale should apply because *Alan Ritchey* was "an application of longstanding Board precedent requiring employers to bargain over discretionary aspects of changes it intends to make after a bargaining representative has been selected." Id.
>
> Of course, there is a problem with that. Even were I to proclaim agreement with the *Alan Ritchey* panel that the rationale of *Fresno Bee* was "demonstrably incorrect," it remains the case that before *Alan Ritchey* there was *Fresno Bee*, and under *Fresno Bee* and its rationale--which was adopted by the Board--the instant allegation of the complaint must be dismissed. *Alan Ritchey* overruled *Fresno Bee*, but *Alan Ritchey* is not precedent. That leaves *Fresno Bee*, wrong as it may be, in place. In any event, even were one to ignore *Fresno Bee*, as the Board made clear in *Alan Ritchey*, the general application of its principles was not so clear that the Board was willing to apply the decision in *Alan Ritchey* retroactively. That was also a part of *Alan Ritchey's* rationale, but not a part that General Counsel wants me to apply here.
>
> Some believe that the Board will reaffirm *Alan Ritchey's* principles. It may or it may not. And if it does, it may or may not once more decline to apply the principles retroactively. I agree with the Respondent's position on this: "the Administrative Law Judge must apply Board precedent as it finds it." (R. Br. at 28). It is not my position to guess or anticipate what the Board will do in the future, but rather to apply the Board's precedents as best I can. While *Alan Ritchey* is not precedent, *Waco, Inc., Inc.*, 273 NLRB 746, 749 fn. 14 (1984), is: "We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether that precedent should be varied" (citation omitted). Accord, *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enf'd. 640 F.2d 1017 (9th Cir. 1981). I will dismiss this allegation.

9. There is no allegation in the Amended Consolidated Complaint that the actions described in ¶11 involve discrimination against the employees involved based on the employees' exercise of rights protected by the NLRA.

10. There is no allegation in the Amended Consolidated Complaint that the employer has refused any request from the Union to bargain with respect to the actions described in ¶11.
11. As conceded by the General Counsel in *Ready Mix*, the Supreme Court of the United States has taken action that undercuts *Alan Ritchey* standing as precedent.
12. Since, as explained in *Ready Mix*, the ALJ is bound to follow *Fresno Bee* in this case, the dismissal of ¶11 charges is appropriate and required in this matter.

WHEREFORE, Respondent requests the NLRB to DISMISS all of the charges in this matter premised on *Alan Ritchey* and to direct that no hearing or record as to those charges is required in this matter.

Respectfully submitted,

/s/ Louis J. Capozzi, Jr.
Louis J. Capozzi, Jr., Esquire
[Respondent's Legal Representative]

DATE: February 4, 2016

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Section 102.21 of the Board's Rules and Regulations, a true and correct copy of this Motion to Dismiss in Part was served electronically sent to the email addresses of record noted below:

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/s/ Louis J. Capozzi, Jr.
Louis J. Capozzi, Jr., Esquire
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DATE: 2/4/2016